**Chetty v Chetty**

**(2013) SLR 521**

Domah, Fernando, Twomey JJA

6 December 2013 SCA 54/2011

**Counsel** B Hoareau for the appellants

A Derjacques for the respondents

**The judgment of the Court was delivered by**

**DOMAH JA**

[1] This is an appeal against the decision of the Chief Justice relating to a dispute between the appellants and the respondents where the appellants were seeking an order under art 834 of the Civil Code for respondent no 1 to sell back a property which had been sold by one of the co-owners (respondent no 2) to respondent no 1. The Chief Justice decided that for an action to succeed under art 834, the parties have to adduce evidence with respect to the actual subject-matter ie the three tenths of the share which was concerned at the time of the offer and the evidence in the case fell short of it. The respondents have also cross-appealed against the decision of the Chief Justice.

[2] The appellants have advanced the following grounds of appeal:

1) The Judge erred in law and on the facts in failing to accept the evidence and reports of the valuers as correctly establishing the value of the property and consequently the value of the first respondent's share in the property, at the time of the offer.

2) Alternatively, the Judge erred in law and on the facts in failing to set the value of the property and that of the first respondent's share in the property at the time of the offer, based on the evidence and the reports adduced in the case.

3) The Judge erred in law in failing to exercise the power that the trial judge had under art 834 of the Civil Code to set, determine and fix the value of the property and that of the first respondent's share.

4) The Judge erred in law in dismissing the appellants' plaint in that the statement of defence filed on behalf of the respondents failed to aver and plead what was the correct value of the property and that of the first respondent's share in the property at the time of the appellants' offer.

5) Consequently, the Judge erred in failing to cancel the usufructuary interest of the second respondent, which the first respondent granted the second respondent after the first respondent had absolutely acquired the second respondent's share in the property.

[3] The cross-appeal of the respondents, on the other hand, reads as follows:

> The Honourable Judge erred in law in having rejected the expert valuation report and expert testimony of the Respondents witness, namely Mrs Cecile Bastille.

[4] At the time of hearing this appeal and the cross-appeal, we invited arguments on whether the action which was brought by the appellants against the respondents was properly based on art 834 of the Civil Code. Counsel for the appellants needed time to respond even if he took the view that the action was a proper one under that article. Counsel for the respondents who had raised an issue before the Court below of the constitutionality of art 834 submitted that art 834 was not meant for the type of situation which gives rise to the present action. On the other hand, counsel for the appellants took time to make a submission that the facts show a proper application of art 834. We are grateful to him for his admirable written submission which he forwarded after the hearing as he had stated he would.

[5] The issue which continues to bother us is as follows: whether the term third party in art 834 would include a party who is related in blood to any of the co-owners as a family member or a potential heir to the property or whether it would mean a total stranger to the family property.

[6] The appellants and the respondents became the joint owners of land parcel V5495 in the following proportions: appellants seven tenths and respondent no 2, three tenths. This property comprises land and buildings which are business premises in Victoria. On 28 July 2008, respondent no 2 transferred her share to respondent no 1 for value. The transfer was duly registered on 13 September 2006.

Thereafter, on 24 October 2006, respondent no 1 granted a usufructuary interest in the three tenths sold to her to respondent no 2. The appellants, in August 2008, offered to purchase the said property for R 3,150,000 which was rejected by respondent no 1 as grossly undervalued.

[7] The plaint is not worded strictly in terms of art 834. However, in the affidavit the basis of the action is apparent. For the crucial word "third party," the averment is that at the time of the sale "Mersia Vasantha Chetty was not a co-owner of parcel V5495." As such, the appellants regarded her as a third party.

[8] Article 834 reads:

> In the case of the sale of a share by a co-owner to a third party, the other co-owners or any of them shall be entitled, within a period of ten years, to buy that share back by offering to such third party the value of the share at the time of such offer and the payment of all costs and dues of the transfer.

[9] The question which may have to be decided by the competent court sooner or later is the meaning of the term "third party" in art 834. There is one view that third party in the context can mean only *un tiers acquéreur* who is not a family member of the co-owner. The competing view is that art 834 would not apply where the transfer by sale or donation is made to a family member. Indeed, it would be odd that a donation could not be bought back but a sale could be.

[10] This provision is specific to Seychelles. We have not found its counterpart in any other jurisdiction but the anxiety of the legislator to ensure that property is kept within the family circle is

evident. The rationale is that any foreign element in the family property is given 10 years to adjust and if either he or she is uncomfortable or has become a nuisance, he or she can be paid off with the necessary judicial assistance where the other co-owners disburse the market price.

[11] Nor have we come across any case law which has dealt specifically with this point even if a couple of cases have been involved with the application of art 834.

[12] Counsel for the appellants referred to the very case which we thought generated this judicial debate among us: *Michel v Vidot* (No 2) (1977) SLR 214.This decision may be variously interpreted.Mr and Mrs Andrea Michel were the co-owners in *indivision* for half share each in two portions of land at Anse aux Pins, Mahe. One portion was of an extent of 1.9 acres and the other of 3.25 acres. They had eight children. On the death of Andrea Michel, his half share devolved on the eight children. Thereafter, Mrs Andrea Michel sold the bare ownership of her half share in the two proportions to three of her children Irene Michel, Liliane Michel and Reine Michel, reserving for herself the usufruct until her demise. The three children sold the bare ownership to the defendant, Vidot, who by the look of it was a complete stranger to the succession. Vidot was served with a claim for *retrait* which he resisted. Sauzier J, applying art 834 of the SCC decided as follows:

> This article by its very wording entitles a co-owner to buy back a share in the common property which another co-owner has sold to a third party.

[13] The Court, accordingly, held that the co-heir had a right to challenge such a disposition without going through the fiduciary.

[14] What is important to note is that the sale by Mrs Andrea to her three girls was not challenged. What was challenged was the sale made by the three girls to Mr Vidot. In the case in hand, the affidavit in support avers as follows:

> Prior to Mersia Vasantha Netta Chetty (hereinafter "Mersia") acquiring the undivided three tenths (3/10) share in parcel V5495 from Mrs Lea Raja Manikam Chetty, Mersia Vasantha Netta Chetty was not a co-owner of parcel V5495.

[15] Unlike the case of *Michel v Vidot*, the sale here is that of the mother to the daughter.

[16] Be that as it may, counsel for the appellants have presented a commendable submission on why in his view the term "third party" in art 834 should be interpreted as per para [9]. He has referred, inter alia, to various other provisions of the Civil Code relating to devolution of property and succession rights contained in arts 384–389, 488, 544, 578, 582, 617, 718–727, 784, 1121, 1130, 1161 and 1165. All these, to him, support his view. Others would argue that all these only support the view that the Civil Code attached a great importance to the concept of the family, the family property and the rights of children.

[17] We are unwilling to venture into this issue at this stage in this case and as an appellate court. The constitutionality of this provision was broached at one time but not pursued. We are in a civil dispute. The matter has not been raised by either party whether at the trial stage or at the appeal stage. It is enough for the time being that we bring this to the attention of the Civil Code Revision Group which is currently dealing with the revision of the Seychelles Civil Code so

that the term third party may be defined with clarity. Nor is art 834 predicated by any general article from which this specific article could be interpreted. The rationale for its existence and its relevance in our modern society is anybody's guess. Counsel for the appellants has pointed out that a co-owner may donate his or her share to his or her heir. This would not be covered by art 834. But where he or she sells it, it would be covered. That may be another oddity.

[18] With such remarks, we proceed to determine the issues raised in the cross-appeal and the cross-appeal.

[19] The dispute between the parties is not that they are unwilling to sell back the three tenths but that they would only do so at the market value under the law. Both parties adduced evidence as to the market value. The appellants had offered to respondent no 1 the sum of R 3,150,000.00 as consideration for the three tenthsless the usufruct which had to be cancelled. This was considered grossly inadequate by respondent no 1. Ms Bastille for the respondents had valued the whole property at R 22,328,000.00 as at 27 September 2010. This the Chief Justice found was not helpful inasmuch as it did not reflect the value of the property at the time of the offer, which was two years earlier.

[20] The appellants had called two experts. One valued the premises – as opposed to the three tenths less the usufruct – at R 11,000,00.00 and the other at R 10,400,000.00. In the view of the Chief Justice, the disparity was so big, he did not wish to accept it to proceed further. His comment was that the value was "clearly less than the actual open market value of the property." He decided, therefore, that for an action of this nature to succeed, the appellants must offer the correct value of the three tenths at the time of the offer, which they had not done.

[21] It is the submission of counsel for the appellants that the Court should have proceeded to set, to fix and to determine the value on the evidence adduced as an exercise of the Court's duty under art 834. We would grant him that.

[22] However, the question is whether the Court was in presence of sufficient cogent evidence on which it could rely to set, fix and determine the final figure, an exercise which it does as a matter of course in other actions under the law. It was incumbent upon the appellants to show that they had made an offer of the market value of the subject property in question. Likewise, it rested upon the respondents to show that the sum offered for the subject property was grossly inadequate. We have examined the reports of all the three experts and gone through their evidence.

[23] It would be unfair to comment upon their competence to give valuations in a legal environment where the profession of property valuers is not regulated. However, the fact remains that what is good for commercial clients is not necessarily good for a court of law. A court of law's determination has to depend upon reliable evidence not only as regards the market value of the precise subject property but also as to the method that has been used to set that market value. That evidence in this case is defective. For example, the evidence of witness Sebastien Yumboo reads as follows:

> Q: What is the value of the 30% bare ownership of the property?
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> A: The value of the 30%. It has to be calculated and this wasn't part of my instructions to calculate that per cent with the value of the property.

Q: So I will repeat my question. Sir, does your report, your valuation disclose the value fo 30% bare ownership of this property. Yes or No?

A: No.

[24] The evidence of Mrs Veronique Bonnelame, a land economist, is that the value of three tenths of the property is R 3,300,000 which includes the value of the bare ownership and the usufruct. However, she added that if she were given the instruction to put a value of the usufruct she would do that. According to her, this is a completely different valuation from market valuation because she would need access to the medical records of the person and her income because it relates to the life expectancy of the usufruct holder. The income element is needed because of "the adage that rich people live longer and paupers die sooner." She could not give an answer to the value of the three tenths because her instructions were to value the property as a whole. There were other queries which had been made on the valuation as to whether it included its value as a going concern inasmuch as the value given by her is R 4,000,000 for building and R 7,000,000 for land. This was as at November 2008. Subsequently, there was a fall in the value of the rupee by 68%. What was R 11,000,000 then would be R 16,500,000 today. What is more, she stated she did not quarrel with the figure that the market value of the whole property is R 22,000,000. Except that valuation being what it is, she will only be able to competently comment after she has taken cognizance of the content of the report. The report had not been given to her to carry out this exercise.

[25] Ms Cecile Bastille is a quantity surveyor who has, from the evidence, been giving evidence in courts on such matters for a long time. She arrives at a figure in her evidence for the specific subject

property in question: for the land – R 10,680,000; for the building – R 11,198,000; and for the external works – R 450,000.

[26] We have examined her report and gone through her evidence. However, what is the reliability of the valuation of the property from which the subject matter could be calculated? It is silent on the method which has been used for the calculation. There is hardly any comparable. The only comparable we come across in evidence has been for rental value and not sale value. Here we are concerned with a sale and a rental. How does a court of law calculate a sale value from a rental value? That aspect has been broached but not fully explained as is evident by the valuation reports of Sebastien Yumbu and of Veronique Bonnelame.

[27] In such a state of the evidence, the Court found itself little enlightened on the actual market value of the properties in question from which a reliable calculation could be made on the market value of the subject matter of the sale of the three tenths of parcel V5495. The matter was further put in doubt by the fact that the profession - who is entitled to practice as a valuer of properties in the country - is unregulated. While we agree that, in the absence of any formal system of regulation, anyone who shows his or her learning and competence may do so subject to the Court's appreciation, the fact remains that in this case, each party has challenged the competence of the other party's expert to give a proper valuation.

[28] In actual fact, the three valuations are not very persuasive on precisely what was being valued, which method was being used for the valuation and the rationale and preference for the method, in the circumstances of the case. Two of the reports suggest that it is the comparison method of valuation. This, in fact, is the most commonly used and accepted method in ascertaining the market value of

properties. Under the comparison method, the valuation approach entails comparing the subject property with similar properties that were sold recently and those that are currently being offered for sale in the vicinity or other comparable localities. The characteristics, merits and demerits of these properties are noted and appropriate adjustments thereof are then made to arrive at the value of the subject property. However, in the relevant reports, we note that what were compared were not the sale values but rental values.

[29] The valuation of a property for the purposes of assessing its market value is a serious exercise where it is the Court that is required to make a determination and a pronouncement on it. The Court needs to be satisfied that the method that has been used for the valuation is the correct one from the various methods which are used in this science and that the final figure reached has applied the method correctly. It would be otherwise in a commercial transaction where other factors come into play: see *Gajapatiraju v Revenue Divisional Officer, Vizagapatam*[1939] AC 302. For the purposes of the Court's determination, the market value is the value which will be paid by a willing purchaser to a willing seller in the market, and not what some valuer thinks ought to be the market value: *Re Morgan and London and North Western Rly Co* [1896] 2 QB 469**.** The prices paid for comparable property in the neighbourhood are the usual indication as to the market value:*Streatham and General Estates Co Ltd v Works and Public Buildings Commrs* (1888) 52 JP 615**.** There is little evidence that these matters had been in the minds of the valuers when they prepared their report or gave their evidence.

[30] The Court, in these circumstances, could not get into the arena, in a highly contested civil dispute, to take it upon itself to decide in a science without the help of those competent in that

science. Courts are courts of law and not marketing firms. They have necessarily to rely on cogent evidence adduced. They are not allowed to speculate. They may not decide arbitrarily.

[31] For the purposes of both the appeal and the cross-appeal, the issue is the same: insufficiency of credible evidence. Parties, in the circumstances, are to go back to their experts and come up with something more credible on either side to enable the Court to decide between the competing values offered, along the principles which the courts have applied over the ages. Parties may also – and they are encouraged to do so – elect a common valuer for the purposes of reducing the number of the issues in their dispute.

[32] The appeal and the cross-appeal are therefore dismissed with costs.